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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

DAVID C. TAYLOR, Plaintiff and Appellant, v. DENNIS W. BROWN et al., Defendants and Appellants.	C058435 (Super. Ct. No. SCV16441)

Returning to us after remand to the Placer County Superior Court, this case involves a dispute between two neighbors whose property is divided by a fence. For many years, the parties believed the fence constituted the legal boundary between the parcels, until a survey commissioned by plaintiff David C. Taylor showed the fence actually stands inside the legal boundary of Taylor's land. Taylor filed a complaint for declaratory relief and to quiet title to the property. Taylor's neighbors, Dennis W. and Patricia A. Brown, who use the widest part of the disputed triangular section[1] as a paved driveway,

[1] The survey map shows the disputed section is approximately 780 feet long and 39 feet across at its widest point; at its narrowest, the disputed area is about six feet across.

cross-complained for declaratory relief and to quiet title on theories of adverse possession, agreed-upon boundary, estoppel, general equitable principles, good faith improver, and prescriptive easement.

In our previous nonpublished opinion, we held that the trial court erred in awarding a portion of Taylor's property to the Browns on theories of adverse possession and agreed boundary. Thereafter, we modified our opinion and remanded the matter for further proceedings, directing the trial court to "conduct a de novo review of the evidence to determine the merits of Taylor's complaint and any surviving theories of relief raised by the Browns in their cross-complaint." (*Taylor v. Brown* (May 4, 2006, C050077) [nonpub. opn.] (*Taylor I*) [as mod. June 1, 2006].)

On remand, the trial court conducted a hearing and thereafter entered an amended judgment and decree (the amended judgment) quieting title in the disputed property in Taylor, but granting the Browns a non-exclusive prescriptive easement over their existing paved driveway on Taylor's property for ingress and egress to their property, so long as they own it and live there. The amended judgment states the trial court's finding that the Browns are also entitled to "general equitable relief in accord with the decision of *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, . . . but it prefers to grant the Browns a prescriptive easement as described above."

Taylor appeals from the amended judgment. He does not challenge the court's finding that the Browns are entitled to a prescriptive easement over the disputed property. His only contention is that "[t]he Browns are not entitled to an equitable easement."

The Browns filed a cross-appeal. Although they also purport to cross-appeal from the amended judgment, their appeal consists wholly of a "respectful[] request" that we "reconsider" that portion of our previous opinion in *Taylor I* in which we found that because the Browns failed to establish payment of taxes on the disputed property, they could not establish their claim of adverse possession.

Neither the appeal nor the cross-appeal has merit. We shall affirm the amended judgment.

FACTUAL BACKGROUND

For the facts underlying the boundary dispute, we rely chiefly on our prior unpublished opinion in *Taylor I*.[2]

At issue in this case is whether a fence between two lots on what is now Shamrock Lane in rural Lincoln should be construed as the true boundary between the abutting parcels. Taylor owns lot 14; the Browns own lot 5.

Taylor bought lot 14 in 1990. In connection with the purchase, Taylor's predecessor told him "[t]hat fence line is

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[2] We also grant Taylor's request that we take judicial notice of our own files and records in *Taylor I*, *supra*, C050077.

the property line, as far as I know" and the written disclosure informed him that "[t]he fence line is shared with the neighbors." Accordingly, Taylor assumed the fence was the boundary line between lot 14 and lot 5.

The Browns leased, and then purchased lot 5 in or about 1996. The Browns' predecessor always "considered the fence line was the property line" and they were told when they purchased the property that the fences "are shared in common with adjoining landowners."

In 2000, Taylor wanted to build a house on his property and, in connection with applying for permits and determining the proper setbacks from the property lines, he commissioned a survey of lot 14. The survey showed that the fence line between lots 5 and 14 is located up to 39 feet inside the actual perimeter of Taylor's lot 14 at its widest point.

Taylor notified the Browns of the results of the survey, and this lawsuit ensued.

Dennis Brown testified at the court trial that (among other things), if Taylor were to prevail, Brown would have to "figure out how to put a new [driveway] on that hill which would be very difficult" given the angle of the driveway, the existing 12 percent grade, the need to maneuver a large trailer on the driveway, and the need to avoid the existing septic system leach fields. In addition, some trees would have to be removed. Brown estimated that laying 900 feet of new paving for a 10-foot-wide driveway would cost over $40,000.

For his part, Taylor testified that he had "a lot of run-off from [the Browns'] property onto mine" and, should he prevail, he intended to tear up the existing driveway used by the Browns, dig a trench on the disputed property to install underground utilities for his planned house, and install a drain in the disputed portion to alleviate the drainage onto his property.

The trial judge also visited the site of the boundary dispute.

After the court trial, the court found that the Browns had acquired title to the disputed property between the existing fence line and the boundary line on theories of adverse possession and agreed boundary. Taylor appealed from that judgment. In *Taylor I*, we held that substantial evidence did not support the trial court's award of Taylor's property to the Browns on either the theory of adverse possession or agreed boundary, and thereafter remanded and directed the trial court to "conduct a de novo review of the evidence to determine the merits of Taylor's complaint and any surviving theories of relief raised by the Browns in their cross-complaint." (*Taylor I*, *supra*, C050077, as mod. June 1, 2006.)

On remand, the parties submitted additional briefing and the trial court conducted a hearing. Thereafter, the court entered the amended judgment. On Taylor's complaint, the court quieted title in the disputed property on the Browns' side of the fence in Taylor, "subject to a non-exclusive easement over

the existing paved driveway in favor of the Browns for the ingress and egress to their property."

On the Browns' cross-complaint, the court found the Browns had met "all of the requirements to establish a non-exclusive prescriptive easement and [it] awarded [them] a prescriptive easement over the existing paved driveway across the disputed area . . . including the right to maintain and use the driveway, until such time as [they] sell or fail to reside on the property." It also enjoined Taylor from interfering with the Browns' use of the driveway, but awarded Taylor the right to construct a culvert under the driveway at his own expense for drainage, so long as he promptly restores the driveway to its pre-culvert condition.

The court also found that the Browns' theory of "general equitable relief in accord with the decision of *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749" survived remand, and further found that "the Browns are entitled to such relief, but [the court] prefers to grant the Browns a prescriptive easement as described above."

DISCUSSION

I. Taylor's Appeal

The amended judgment reflects that the Browns succeeded on remand in showing they are entitled to an easement across that portion of Taylor's land on their side of the fence on two, independent legal theories: (1) an easement by prescription, and (2) an easement by operation of equity, i.e., a property

interest fashioned by the trial court using its power in equity to protect the Browns' use of the disputed property.

Although Taylor's brief on this appeal asserts generally that the amended judgment represents an abuse of the court's discretion "in that the evidence before the court at the de novo review does not support the decision and is contrary to the legal issues previously decided" in *Taylor I*, the brief nowhere challenges the factual or legal basis for the trial court's determination that the Browns proved their entitlement to maintain and exercise a non-exclusive prescriptive easement in the driveway. Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)

Thus, we read Taylor's appeal to consist solely of his contention the trial court erred in relying on *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749 (*Hirshfield*) "to create an equitable easement in favor of the Browns."

This assertion is without merit because the court did not grant the Browns an "equitable easement." A close reading of the amended judgment shows the court actually *declined* to create a property interest in favor of the Browns based on general equitable relief in accord with *Hirshfield*. Instead it found the Browns had "met all of the requirements to establish a non-

exclusive prescriptive easement and *are awarded a prescriptive easement* over the existing paved driveway across the disputed area . . . ." (Italics added.) But it found that, although "the Browns are entitled" to the equitable relief described in *Hirshfield*, *supra*, 91 Cal.App.4th 749, it "prefer[red] to grant the Browns a prescriptive easement."

The distinction between the two kinds of property interests, and the court's authority to utilize its powers in equity to create a protective interest, independent of the law of prescriptive easements, are discussed at length in *Hirshfield*, *supra*, 91 Cal.App.4th 749.

In *Hirshfield*, the boundary line between two residential properties in Bel-Air had been mistaken for many years and the yards of the two properties had been extensively improved in reliance thereon. Eventually, the parties in *Hirshfield* learned that the boundary line was not where they had believed, each one having made use of a portion of the other's property. The plaintiffs brought suit, seeking to quiet title to one 32.5-square-foot triangle of land and one 217-square-foot triangle of land. The defendants had placed a block wall and certain landscaping on the smaller parcel, and they had improved the larger parcel with a portion of a sand trap, extensive underground electrical and water lines, several motors to provide circulation for waterfalls and a swimming pool, and an underground iron-and-concrete enclosure housing one of the

larger motors. (*Hirshfield*, *supra*, 91 Cal.App.4th at pp. 755–756.)

The trial court in *Hirshfield* exercised its equitable powers to grant relief in the form of a judgment for what it termed "an easement," giving the defendants an exclusive right to use the property in question, until such time as they sold their property or stopped living there. (*Hirshfield*, *supra*, 91 Cal.App.4th at pp. 757, 764; see *Gray v. McCormick* (2008) 167 Cal.App.4th 1019, 1031-1032.) It did so by applying the doctrine of "balancing of conveniences" or "relative hardship," by which a trial court considers the parties' relative conduct and the hardship(s) each would face from the continuation/ removal of the encroachment, and determines whether to enjoin a trespass caused by the encroachment or create a protective interest in equity to protect the neighbor's encroachment. (*Hirshfield, supra,* 91 Cal.App.4th at pp. 758-761, 764-765; *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 562-563; see also 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 172, pp. 498–501.)

The appellate court in *Hirshfield* affirmed the trial court's creation of an exclusive easement to protect the neighbors' encroaching improvements (*Hirshfield*, *supra*, 91 Cal.App.4th at p. 772), noting with respect to the law of prescriptive easements, that "exclusive easements, while rare, are possible" (*id*. at p. 769, fn. 11). However, it also stated that the judgment did not violate the law of prescriptive

easements, because the right of exclusive use created by the judgment was not in reality a prescriptive easement. Rather, the trial court had created the right of exclusive use through the employment of its equitable powers, to grant affirmative relief to an encroacher. (*Id.* at pp. 754–755.)

In our case, however, the trial court *declined* to exercise its powers of equity to grant the Browns an "equitable" easement.[3] True, the reporter's transcript of the hearings prior to entry of the amended judgment shows that the trial court considered exercising its equitable powers to fashion a protective interest for the Browns, weighed the relative hardships, and found that the Browns would suffer greater hardship from removal of the driveway on Taylor's property than Taylor would suffer from its continuation. To the extent Taylor disputes the sufficiency of evidence to support this conclusion--or the court's subsequent finding the Browns have shown "they are entitled" to general equitable relief--his objection is not well taken. Not only did Dennis Brown testify at the court trial as to his estimate of the cost and difficulty associated with moving the encroaching driveway, but the trial

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[3] Taylor uses the term "equitable easement." However, the amended judgment carefully avoids this term as did the appellate court in *Hirshfield*, *supra*, 91 Cal.App.4th 749, which used the term "protective interest in equity" (*id.* at pp. 754-755, 765, 769, 771). We believe the term "equitable easement" was invented by the real estate treatise Miller & Starr and not by California case law. (See 6 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 15.46, p. 15-161.)

court here viewed the disputed property, and its observations are evidence which may be used alone or with other evidence to support its findings that the balance of hardships favored the Browns. (See *Hirshfield*, *supra*, 91 Cal.App.4th at p. 762 [where the trial court's observations of the disputed property and encroachments were not reported and are not part of the record on appeal, appellate court must presume that the evidence the court saw was sufficient to support its findings].)

In contrast to the exclusive "easement" granted in *Hirshfield*, the Browns' easement is limited in duration and scope, and it is a "non-exclusive" easement from which the Browns may not exclude all use by Taylor. (Cf. *Hirshfield*, *supra*, 91 Cal.App.4th at pp. 754–755, 769, fn. 11; see also *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1187 [noting that the court in *Hirshfield* "declared an equitable easement over a fenced-in area by balancing the hardships. Th[at] case did not involve the claim of a prescriptive easement"].) Notwithstanding its finding the Browns might be legally entitled to a protective interest in equity, the trial court refrained from granting them one.

Because Taylor limits his argument on appeal to challenging an action (granting a protective interest in equity) that the trial court declined to take, and makes no challenge to the trial court's grant of a prescriptive easement, he has shown no basis for reversing the amended judgment.

II. The Browns' Cross-appeal

The Browns filed a cross-appeal, in which they purport to challenge the amended judgment. However, their brief on appeal consists wholly of a "respectful[] request" that we "reconsider" that portion of our opinion in *Taylor I* in which we found the Browns failed to establish they paid taxes on the disputed property and thereby failed to establish their claim of adverse possession. We deem this request for reconsideration of our previously filed, and long-final, opinion in *Taylor I* to be essentially the same as a request for rehearing, and as such, it comes too late. We decline to consider it. (Cal. Rules of Court, rule 8.268(b)(1).)

DISPOSITION

The amended judgment is affirmed. Each side shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

BUTZ, J.

We concur:

SCOTLAND, P. J.

SIMS, J.